1994

Bear River Mutual Insurance company vs. Mike Jacobsen and Utah Valley Community College, a body politic of the State of Utah : Reply Brief

Utah Court of Appeals

IN THE COURT OF APPEALS, STATE OF UTAH

BEAR RIVER MUTUAL INSURANCE COMPANY,

Plaintiff/Appellant

vs.

MIKE JACOBSEN and UTAH VALLEY COMMUNITY COLLEGE, a body politic of the STATE OF UTAH,

Defendants/Appellees

94-0148-CA

Case No. 930566
920905486PD

Priority No. 15

APPELLANT'S REPLY BRIEF

Appeal from an Order of Judgment of Dismissal Entered in the
Third Judicial District Court in and for Salt Lake County
Honorable Tyrone E. Medley, Judge

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INTRODUCTION

Comes now the Appellant, Bear River Mutual Insurance Company, (hereinafter designated as "Bear River") and through its attorney submits the following in reply to the brief filed by the Appellees, Mike Jacobsen and Utah Valley Community College, a body politic of the State of Utah.

DETERMINATIVE STATUTES

The determinative statutes in resolving this case are in Utah Code Annotated, as follows:

Utah Code Annotated, 1953, as amended §31A-22-302.
Utah Code Annotated, 1953, as amended §31A-22-307.
Utah Code Annotated, 1953, as amended §31A-22-309.
Utah Code Annotated, 1953, as amended §41-12a-103
Utah Code Annotated, 1953, as amended §41-12a-301
Utah Code Annotated, 1953, as amended §41-12a-407
Utah Code Annotated, 1953, as amended §63-30-5.
Utah Code Annotated, 1953, as amended §63-30-11.
Utah Code Annotated, 1953, as amended §63-30-12.
Utah Code Annotated, 1953, as amended §63-30-14.

ARGUMENT

POINT I.

THAT THE PLAINTIFF'S COMPLAINT MUST NOT BE DISMISSED FOR FAILURE TO STATE A CLAIM IN LAW OR IN FACT.

The Defendant, State of Utah's reasoning under Point I is difficult to follow. It is submitted that it is difficult to differentiate whether Defendant is claiming (1) that the State of Utah is not required to arbitrate pursuant to the case of **U.S. Fidelity & Guarantee v. United States**, 728 F.Supp. 651, 655 (D.Utah 1989), or (2) that they admit that they are required to arbitrate, but that a claim for arbitration has not been made by Appellant.

Suffice to say, in the **U.S. Fidelity** case, supra, the U.S. Federal District Court merely stated that the United States Government was not subject to the provisions of the Utah PIP Statute, Utah Code Annotated, 1953, as amended §31A-22-309(6). The gist of the case was that the State of Utah, by and through its Legislature, could not impose, pursuant to the United States Federal Tort Claim Act, PIP benefits on the United States.

Judge Sam stated in that decision clearly his reasoning:

> " . . . The federal waiver, not state law, is the overriding consideration. More specifically, under the previously quoted law, the extent of the waiver may not be measured solely by the manner in which the state legislature addresses the federal government in its no-fault insurance plan."

The Court held that the requirement of the state of Utah for arbitration would expand the scope of the United States Federal Tort Claim Act to require the

Federal Government to arbitrate without congressional authorization. The Federal waiver, not state law, is the overriding consideration.

Therefore, the application of the U.S. Fidelity case has no application in this case for the simple reason that it's a case of federal immunity and sovereignty vs. state immunity and sovereignty as Judge Sam stated that the Utah State sovereignty must be subject to the United States Federal Government's sovereignty under the Federal Tort Claim Act.

As to the question of arbitration by the state of Utah, this is statutory, pursuant to Utah Code Annotated, 1953, as amended §31A-22-309(6) and we allege that this issue or question of arbitration has become a proper issue before the Court. A review of the facts and pleadings in the above matter will amply demonstrate that the question of arbitration was properly brought before the Court and the position of the Defendant that it can have the Complaint dismissed for not raising the issue of arbitration is not apropos to the status of this case at this time.

A review of the facts amply demonstrates the Appellant's position as follows:

1. The Plaintiff filed a Complaint largely in the nature of a declaratory action stating two causes of action:

   a. that the Defendant was negligent; and

   b. that the Utah Government Immunity Act Utah Code Annotated, 1953, as amended §63-30-11 did not apply because the obligation of PIP benefits was contractual in nature. (R.2)

2. The Defendants filed a Motion to Dismiss, dated February 1, 1993, (R.19), (see the Addendum) and a Memorandum in Support of Defendants' Motion to Dismiss, (R.21), (see the Addendum) which set forth the ground for dismissal based upon Utah Code Annotated, 1953, as amended §63-30-11 and 63-30-12, failure to state a cause of action upon which relief can be granted. The Memorandum, does not mention arbitration, but merely that (1) there was failure to file a timely notice and (2) that the obligation as to Bear River Mutual was not contractual and the obligations between the parties were not contractual in nature, as set forth in §31A-22-309(5). A cursory reading will demonstrate that the Defendant did not raise the question of arbitration in its Motion to Dismiss.

3. Then following a hearing on April 8,1993, the Court entered a Minute Entry, dated June 15, 1993, (R.85) (see the Addendum) which provided two basis for the Motion to Dismiss:

> "1. Defendants motion to dismiss plaintiffs first cause of action is granted. Plaintiff failed to comply with the strict notice requirements of the Utah governmental immunity act.
>
> 2. Defendants motion to dismiss plaintiffs second cause of action fails to state a claim upon which relief may be granted under 31A-22-309(5)."

4. Thereafter, on July 6, 1993, the Plaintiff filed a Motion (R.86) (see the Addendum) to vacate the Minute Entry of June 15, 1993, to conform to the decision in **Sue Neel v. State of Utah**, 854 P.2d 581 (Utah App. 1993), in that the Court of Appeals had rendered the Minute Entry moot and the said Minute Entry and decision of the Minute Entry was therefore inconsistent with the **Neel** case.

5. Defendants, on July 13, 1993, filed their Memorandum in Opposition to Plaintiff's Motion to Vacate the Minute Entry, (R.106) (see the Addendum) attempting to distinguish the **Neel** case, supra, raised for the first time, in that Memorandum, on page 5, the question of arbitration. This was the first time it was raised not by motion but by memorandum and was not contained in the Minute Entry or the previous motion of Defendants to Dismiss.

6. The Minute Entry dated September 15, 1993, on Plaintiff's Motion to Vacate the Minute Entry of June 15, 1993, pursuant to the **Neel** case, supra, and a copy of the Minute Entry, (R.130) (see Addendum) stated:

> "1) The June 16, 1993 Minute Entry encompassed the issues raised in the foregoing motions.
> 2) The court reviewed Neel v. State of Utah prior to preparation of June 16, 1993 Minute Entry and found Neel to be distinguishable from the present case.
> 3) The court submits Second Request to the state of Utah to prepare an order consistent with this minute entry and the June 16, 1993 minute entry."

7. The Order of Dismissal (R.133)(see the Addendum) provided for two grounds: (1) failure to comply with the strict notice requirements of the Utah Government Immunity Act, Utah Code Annotated, 1953, as amended §63-30-11(12), and (2) dismissing the ground pursuant to Utah Code Annotated, 1953, as amended §31A-22-309(5) on the grounds that the claims were not contractual in nature.

8. Therefore, the three issues set forth in Appellant's Brief, as follows, are still properly before the Court:

> POINT I:
> Bear River Mutual is not required to comply with the procedural requirements of Utah Code Annotated, 1953, as amended §63-30-

12 as to notice on personal injury protection claims as provided for in Utah Code Annotated, 1953, as amended §31A-22-307 through 309 as to the State of Utah.

POINT II:

The State of Utah is required, pursuant to Utah Code Annotated, 1953, as amended §31A22-309(6) to arbitrate with Bear River Mutual Insurance Co. on PIP claims.

POINT III:

That the Trial Court committed error in refusing Plaintiff's request to require the State to arbitrate.

9. The question of arbitration was brought to the Court's attention in the Request for Hearing, and the attached Memorandum (R.128)(see the Addendum) in which Plaintiff requested the Court to vacate its previous minute entry and refer the matter to arbitration if the Defendants were now claiming arbitration was an issue.

10. The question of arbitration was raised by the Appellee in its memoranda and the Appellant raised the question of being submitted to arbitration also by memoranda.(R.106)

11. Arbitration has been properly brought before this Court through the pleadings and memoranda filed. There is no basis for dismissing the matter for failure to claim arbitration because the Appellees claimed arbitration in their memoranda and Appellant claimed that the Court should refer it to arbitration if it overruled the **Neel** case, supra.

POINT II.

THE PLAINTIFF'S SECOND CAUSE OF ACTION DOES NOT FAIL ON THE BASIS THAT THERE IS NO CONTRACT BETWEEN THE PLAINTIFF INSURER AND DEFENDANT EMPLOYER.

The issue requirement under Utah Code Annotated, 1953, as amended §60-30-12 providing for notice under the Government Immunity Act as it applies to personal injury protection, is fully set forth in Point I of the Appellant's original brief. The statute, Utah Code Annotated, 1953, as amended §63-30-5(1) provides as follows:

> "(1) Immunity from suit of all governmental entities is waived as to any contractual obligation. Actions arising out of contractual rights or obligations shall not be subject to the requirements of Sections 63-30-11, 63-30-12, 63-30-13, 63-30-14, 63-30-15, or 63-30-19." (emphasis added)

The Utah Motor Vehicle Financial Responsibility Act, Utah Code Annotated, 1953, as amended §41-12a-301 provides that the state of Utah shall maintain owner's or operator's security in effect continuously in respect to their vehicles.

Utah Code Annotated, 1953, as amended §41-12a-103(9) provides that the owner's security may be furnished in a number of ways:

> "(9) 'Owner's or operator's security,' 'owner's security,' or 'operator's security' means any of the following:
>
> (a) an insurance policy or combination of policies conforming to Section 31A-22-302, which is issued by an insurer authorized to do business in Utah;
>
> (b) a surety bond issued by an insurer authorized to do a surety business in Utah in which the surety is subject to the minimum coverage limits and other requirements of policies conforming to Section

31A-22-302, which names the department as a creditor under the bond for the use of persons entitled to the proceeds of the bond;

(c) a deposit with the state treasurer of cash or securities complying with Section 41-12a-406;

(d) maintaining a certificate of self-funded coverage under Section 41-12a-407;

(e) a policy conforming to Section 31A-22-302 issued by the Risk Management Fund created in Section 63A-4-201."

Utah Code Annotated, 1953, as amended §31A-22-302 provides that "Every policy of insurance or combination of policies purchased to satisfy the owner's or operator's security requirement . . ." shall provide for personal injury protection benefits.

The importance in the statutory scheme though, is Utah Code Annotated, 1953, as amended §41-12a-407(2) which provides:

> "(2) Persons holding a certificate of self-funded coverage under this chapter shall pay benefits to persons injured from the self-funded person's operation, maintenance, and use of motor vehicles as would an insurer issuing a policy to the self-funded person containing the coverages under Section 31A-22-302." (emphasis added)

The importance of the statutory particular provision is that the persons that are self-insured, must pay benefits under Utah Code Annotated, 1953, as amended §31A-22-309, the same as if there were two independent, statutory insurers.

CONCLUSION

The questions raised in point II and Point III of Appellants brief are exactly the same issues raised in the **Neel** case, supra. The State argued that there was no contract between its insured and itself to pay PIP benefits. The **Neel** case, supra, stated it was statutorily contractual. The final bottom line argument is that if the

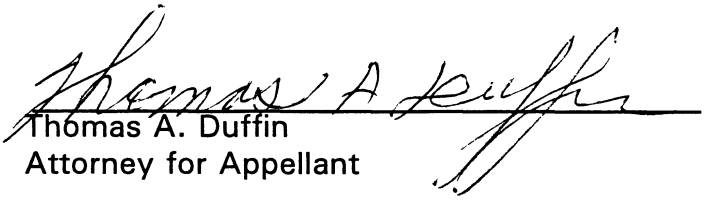
State of Utah's obligation to pay PIP claims to operators of its automobile and Bear River Mutual's obligation is contractual to pay PIP claims to its insureds, then why go through the hoops of sending a notice before requiring both parties to arbitrate. If the State of Utah can require Bear River Mutual to arbitrate without giving prior notice, isn't it apropos that Bear River can require the State of Utah arbitrate with giving prior notice? The purpose of the Utah PIP statute is to provide for a summary and speedy remedy for the payment of claims and the settlement of claims between the various insurers.

This is in direct opposition to Utah Code Annotated, 1953, as amended §41-12a-407(2) which provides that self-insurers shall pay benefits and shall be subjected to the same statutory provisions as private insurance carriers. If private insurance carriers are not required to send notice to each other, why should the state of Utah, which is under the same duty, demand that the hoops of notice be complied with before they can be required to arbitrate?

If it appeals to the State of Utah's sense of justice that the "hoops" of notice is the intent of Legislature, or should be proper procedure, by all means let them adopt it; but it doesn't appeal to this Appellant and all similar insurance carriers in the state of Utah who are trying to carry out the mandate of the Legislature.

Dated this 30 day of March 1994.

JENSEN, DUFFIN, CARMAN, DIBB & JACKSON



Thomas A. Duffin
Attorney for Appellant

Mailing Certificate

I hereby certify that I mailed a copy of the foregoing Reply Brief to the following parties by placing a true copy thereof in an envelope addressed to:

Elizabeth King
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Salt Lake City, Utah 84111

postage prepaid, this 1 day of April 1994.

Thomas A. Dufflin

ADDENDUM

Index to Addendum

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IN DISTRICT COURT

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SALT LAKE COUNTY
BY [signature]
CLERK

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BEAR RIVER MUTUAL INSURANCE COMPANY, Plaintiff, vs. MIKE JACOBSEN and UTAH VALLEY COMMUNITY COLLEGE, a body politic of the State of Utah Defendants.	C O M P L A I N T Civil No. 920905486 PD JUDGE JAMES S. SAWAYA

Comes now the Plaintiff by and through his attorney, Thomas A. Duffin, and complains of the Defendants, Mike Jacobsen and Utah Valley Community College, a body politic of the state of Utah, and respectfully represents unto the court as follows:

JURISDICTION

1. Defendant, Utah Valley Community College, is a subdivision or agency of the State of Utah, created by the Legislature of the State of Utah under the provisions of the Utah State Constitution, Article XI, Section 1.

2. This suit is brought pursuant to Utah Code Annotated, 1953, Title 63, Chapter 30, Sections 1 through 38.

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3. Jurisdiction is also conferred upon the above entitled court pursuant to the provisions of the Utah State Constitution, Article I, Section 7, (Due Process) No person shall be deprived of life, liberty or property without due process of law.

4. That on March 28, 1991, the plaintiff, pursuant to Utah Code Annotated, §63-30-11 and 12, petitioned Salt Lake County for relief. Said petition was denied by refusal to answer within 90 days as required by statute.

5. The plaintiff hereby files an undertaking required by Utah Code Annotated, 1953, §63-30-19.

FIRST CAUSE OF ACTION

6. That at all times herein the plaintiff was an insurance company duly organized and existing under the laws of the state of Utah and authorized to engage in the insurance business who issued a policy of insurance to Larry J. Remm, providing for personal injury protection coverage, policy No. C127191.

7. That at all times herein the Defendant, Utah Valley Community College, was a body politic of the State of Utah, or an agency of the State of Utah.

8. That at all times herein, Mike Jacobsen, was a resident of Utah County, State of Utah, and was an agent of Utah Valley Community College and the state of Utah and was driving a

vehicle during the performance of his duties within the scope of his employment and under color of authority of Utah Valley Community College and the state of Utah.

9. That at all times herein, on January 4, 1991, Larry J. Remm, was the owner of a 1978 Chevrolet automobile, which was being driven by himself and insured with Bear River Mutual Insurance Co. with personal injury protection benefits.

10. The event out of which this cause of action arose took place and occurred on February 15, 1991, at approximately 1:00 p.m. at 4500 South and 320 West, Salt Lake County, Utah, when Defendant's Agent negligently ran his vehicle into the vehicle owned and driven by Larry J. Remm, causing personal injuries in the sum of $2,257.00.

11. That at the time and place mentioned herein the Defendant, by and through its agent, employee, Mike Jacobsen, in the course of his employment and in the performance of his duties, when Larry J. Remm was operating his automobile in a northbound direction exiting I15 and turned west onto 4500 South when Mike Jacobsen struck the right rear of the Remm automobile.

12. The said defendant, Utah Valley Community College, a body politic of the State of Utah, by and through its agent, Mike Jacobsen, was grossly negligent, reckless, careless and guilty of unlawful conduct in the operation of its vehicle in the following particulars:

a. failing to maintain a proper lookout;

b. failing to keep his vehicle under proper control;

c. traveling too fast for existing conditions.

SECOND CAUSE OF ACTION

Comes now the Plaintiff and for cause of action against the Defendants alleges:

13. Plaintiff adopts and by this reference incorporates herein paragraphs 1 through 12 inclusive of the First Cause of Action as though the allegations contained therein were fully and comletely set forth herein.

14. That Utah Code Annotated, 1953, as amended, §63-30-10.5, provides:

> "(1) Immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property without just compensation."

15. That the Utah Personal Injury Protection Coverage and Benefits statute and reimbursement as more fully set forth in UCA 31A-22-309(5) provides that the payment for Personal Injury Protection benefits are contractual in nature. That no notice is required for contractual obligations.

WHEREFORE, Plaintiff prays for judgment against the Defendant as follows:

FIRST CAUSE OF ACTION

1. For judgment against Defendants in the sum of $2,257.00, interest and court costs.

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SECOND CAUSE OF ACTION

2. For judgment against Defendants in the sum of $2,257.00, interest and court costs.

Dated this 26 day of September, 1992.

JENSEN, DUFFIN, CARMAN, DIBB & JACKSON

Thomas A. Duffin
Attorney for Plaintiff

Plaintiff's Address:

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

BEAR RIVER MUTUAL INSURANCE COMPANY Plaintiff, vs. MIKE JACOBSEN and UTAH VALLEY COMMUNITY COLLEGE, a body politic of the State of Utah, Defendants.	:	**MOTION TO DISMISS** Civil No. 920905486PD Judge Glenn Iwasaki

Defendants Mike Jacobsen and Utah Valley Community College, by and through counsel, move this Court to dismiss Plaintiff's Complaint for failure to comply with Sections 63-30-11 and 12 of Utah's Governmental Immunity Act and for failure to state a cause of action upon which relief can be granted. This Motion is supported by the accompanying Memorandum in Support of Defendants' Motion to Dismiss.

DATED this 1st day of February, 1993.

JAN GRAHAM
Attorney General

Barbara E. Ochoa

BARBARA E. OCHOA
Assistant Attorney General

CERTIFICATE OF MAILING

THIS IS TO CERTIFY that I mailed a true and correct copy of the foregoing **MOTION TO DISMISS**, postage prepaid, this 1st day of February, 1993, to the following:

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Debbie Briggs

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

BEAR RIVER MUTUAL INSURANCE COMPANY Plaintiff, vs. MIKE JACOBSEN and UTAH VALLEY COMMUNITY COLLEGE, a body politic of the State of Utah, Defendants.	:	**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** Civil No. 920905486PD Judge Glenn Iwasaki

Defendants Mike Jacobsen and Utah Valley Community College, by and through counsel, submit this Memorandum in Support of their Motion to Dismiss.

FACTUAL BACKGROUND

Plaintiff, Bear River Mutual Insurance Company, alleges that it is entitled to recover for personal injury damages incurred by its insured, Larry J. Remm, resulting from a collision between Remm's vehicle and Defendant's vehicle on or about February 15, 1991.

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Plaintiff alleges that it served a notice of claim on Salt Lake County on March 28, 1991.

ARGUMENT

I. PLAINTIFF FAILED TO FILE A TIMELY NOTICE OF CLAIM

Utah's Governmental Immunity Act requires that an individual must file a notice of claim prior to bringing suit against the State, any of its agencies, or a political subdivision. *See* U.C.A. §§ 63-30-12 and 13 (1953, as amended). The claim is "barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the claim arises, or before the expiration of any extension of time granted under Section 63-30-11 . . . ." (U.C.A. § 63-30-12).

The notice of claim requirements set forth in Utah's Governmental Immunity Act are mandatory and "strict compliance" is the statutory standard. The Utah Supreme Court has held that "where a cause of action is based upon a statute, full compliance with its requirements is a condition precedent to the right to maintain a suit." Scarborough v. Granite School District, 531 P.2d 480, 482 (Utah 1975).

In the present case, Plaintiff's cause of action arose on February 15, 1991, the date of Remm's accident. Plaintiff alleges that it filed a notice of claim with Salt Lake County on March 28, 1991. This notice of claim is of no effect since Salt Lake County

has no governing relationship to Utah Valley Community College whatsoever.

Plaintiff's cause of action is barred for failure to serve a timely notice of claim and its Complaint should be dismissed with prejudice.

II. PLAINTIFF'S SECOND CAUSE OF ACTION FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiff's second cause of action is an apparent attempt to avoid the notice of claim requirement by alleging that its cause of action arises under § 31A-22-309(5) of the Utah Insurance Code. Plaintiff then claims that this creates a contractual obligation for which no notice of claim is required under the Governmental Immunity Act.

Plaintiff's theory is fundamentally flawed. First, there is no contract between Plaintiff and Defendants, and there is no basis to imply a contract from the language of the Insurance Code. Second, Utah Valley Community College is not an "insurer" and is not governed by the provisions of the Utah Insurance Code. *See* U.C.A. § 31A-12-107.

Plaintiff's attempt to avoid the notice of claim requirements of the Governmental Immunity Act by alleging that its second cause of action sounds in contract pursuant to U.C.A. § 31A-22-309(5) is without merit since Defendants are not governed by the Insurance

Code. Therefore, Plaintiff's second cause of action should be dismissed with prejudice for failure to state a cause of action upon which relief can be granted.

WHEREFORE, for the reasons explained above, Defendants pray that Plaintiff's complaint be dismissed with prejudice and that it take nothing thereby.

DATED this 1st day of February, 1993.

JAN GRAHAM
Attorney General

Barbara E. Ochoa

BARBARA E. OCHOA
Assistant Attorney General
Attorney for Defendants

CERTIFICATE OF MAILING

This is to certify that I mailed a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**, postage prepaid, this 1st day of February, 1993, to the following:

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Debbie Briggs

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
BEAR RIVER MUTUAL	:	
PLAINTIFF	:	CASE NUMBER 920905486 PD
	:	DATE 06/15/93
VS	:	HONORABLE TYRONE E. MEDLEY
	:	COURT REPORTER
JACOBSEN, MIKE	:	COURT CLERK STH
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

DEFENDANTS MOTION TO DISMISS WAS SUBMITTED TO THE COURT FOR DECISION AFTER ORAL ARGUMENT. THE COURT HAVING TAKEN THE MATTER UNDER ADVISEMENT COMES NOW BEING FULLY INFORMED AND RULES AS FOLLOWS:

1. DEFENDANTS MOTION TO DISMISS PLAINTIFFS FIRST CAUSE OF ACTION IS GRANTED. PLAINTIFF FAILED TO COMPLY WITH THE STRICT NOTICE REQUIREMENTS OF THE UTAH GOVERNMENTAL IMMUNITY ACT.
2. DEFENDANTS MOTION TO DISMISS PLAINTIFFS SECOND CAUSE OF ACTION FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED UNDER 31A-22-309 (5).
3. DEFENDANTS TO PREPARE ORDER.

CC: BARBARA E. OCHOA
THOMAS A. DUFFIN

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND

FOR SALT LAKE COUNTY, STATE OF UTAH

BEAR RIVER MUTUAL INSURANCE COMPANY,	)	**MOTION TO VACATE MINUTE ENTRY OF JUNE 16, 1993, MOTION TO FILE AN AMENDED COMPLAINT, MOTION FOR ADDITIONAL ORAL ARGUMENT TO CONFORM THE MINUTE ENTRY OF JUNE 16, 1993 PURSUANT THE UTAH COURT OF APPEALS DECISION IN NEEL V. STATE OF UTAH**
Plaintiff,	)	
vs.	)	
MIKE JACOBSEN and UTAH VALLEY COMMUNITY COLLEGE, a body politic of the State of Utah,	)	
	)	Civil No. 920905486PD
Defendants.	)	Judge Tyrone E. Medley

Comes now the Plaintiff and moves the above-entitled Court to vacate the Minute Entry dated June 15, 1993, in which the above-entitled Court found as follows:

> " 1. Defendants motion to dismiss plaintiffs first cause of action is granted. Plaintiff failed to comply with the strict notice requirements of the Utah Governmental Immunity Act.
>
> 2. Defendants motion to dismiss plaintiff second cause of action fails to state a claim upon which relief may be granted under 31A-22-309(5)."

Prior to entry of the above Minute Entry and before it came to the attention of the Court, the Utah Court of Appeals in the case of **Neel v. State of Utah**,

213 Utah Adv.Rep. 43, and reversed the position of the State of Utah. The legal argument of Plaintiff pursuant to the previous memorandum has been affirmed by the Utah Court of Appeals, therefore, the Minute Entry of June 15, 1993, should be appropriately amended to reflect the decision of the Utah Court of Appeals.

Dated this 30 day of June, 1993.

JENSEN, DUFFIN, CARMAN, DIBB & JACKSON

Thomas A. Duffin
Attorney for Plaintiff

MAILING CERTIFICATE

I certify that I mailed a copy of the foregoing Order to the following parties by placing a true copy thereof in an envelope addressed to:

Barbara E. Ochoa
Assistant Attorney General
Attorney for Defendants
Litigation Division
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postage prepaid, this 30 day of June, 1993.

br\rm

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

BEAR RIVER MUTUAL INSURANCE COMPANY Plaintiff, vs. MIKE JACOBSEN and UTAH VALLEY COMMUNITY COLLEGE, a body politic of the State of Utah, Defendants.	:	**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO VACATE MINUTE ENTRY** Civil No. 920905486PD Judge Tyrone E. Medley

Defendants by and through counsel, Barbara E. Ochoa, Assistant Attorney General submit this Memorandum in Opposition to Plaintiff's Motion to Vacate Minute Entry.

BACKGROUND

Plaintiff, Bear River Mutual Insurance Company, alleges that it is entitled to recover for personal injury damages incurred by its insured, Larry J. Remm, resulting from a collision between Remm's vehicle and Defendant's vehicle on or about February 15, 1991. Plaintiff's first cause of action alleged negligence and its

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second cause of action sounded in contract pursuant to Utah Code Ann. § 31A-22-309(5).

Defendants' Motion to Dismiss was heard by this Court and a Minute Entry was issued on June 15, 1993 ruling that Plaintiff's first cause of action should be dismissed for failure to comply with the strict notice requirements of the Utah Governmental Immunity Act, and that Plaintiff's second cause of action should be dismissed for failure to state a claim upon which relief may be granted under Utah Code Ann. § 31A-22-309(5).

Plaintiff has now filed a "Motion to Vacate Minute Entry of June 16, 1993, Motion to File an Amended Complaint, Motion for Additional Oral Argument to Conform the Minute Entry of June 16, 1993 Pursuant to the Utah Court of Appeals Decision in Neel v. State of Utah".

ARGUMENT

I. PLAINTIFF'S FIRST CAUSE OF ACTION WAS PROPERLY DISMISSED

Plaintiff's first cause of action, based on negligence, was properly dismissed for failure to comply with the strict notice requirements of the Utah Governmental Immunity Act.

Plaintiff fails to cite any new or different authority for its proposition that the letter it sent to the State Office of Risk Management constituted an adequate notice of claim. This argument has been ruled on and Plaintiff should not be allowed to reargue

this issue by means of a Motion to Vacate.

II. PLAINTIFF'S SECOND CAUSE OF ACTION WAS PROPERLY DISMISSED

Plaintiff is not entitled to protection under Utah Code Ann. § 31A-22-308 and its complaint was therefore properly dismissed.

Defendants admit, for purposes of this argument only, that they are required to maintain owner's or operator's security pursuant to Utah Code Ann. § 41-12a-301(3), and that they are further obligated to provide personal injury protection coverage (PIP) pursuant to Utah Code Ann. § 31A-22-302(2).

Personal injury protection is defined in Section 31A-22-306 as follows:

> Personal injury protection under Subsection 31A-22-302(2) provides the coverages and benefits described under Section 31A-22-307 to persons described under Section 31A-22-308, but is subject to the limitations, exclusions, and conditions set forth in Section 31A-22-309.

(emphasis added). The next logical inquiry is whether Plaintiff or its insured is one of the persons intended to be protected under Section 31A-22-308.

Section 31A-22-308 identifies those persons who "may receive benefits under personal injury protection coverage": (1) the named insured; (2) persons related to the insured by blood, marriage, adoption, or guardianship; and (3) "any other natural person whose injuries arise out of an automobile accident occurring while the

person occupies a motor vehicle described in the policy . . . ". Plaintiff's insured, Larry Remm, meets the criteria to collect from his own insurance carrier, but not against the PIP coverage carried by the State. Mr. Remm was not the named insured on the State's policy, nor is he related by blood or marriage to the State, and he did not occupy the state vehicle at the time of the accident. Clearly, neither Mr. Remm nor his insurance carrier qualifies as a person entitled to benefits under Section 31A-22-308.

As a result, Plaintiff's contract claim must fail since only "[t]he person entitled to the benefits may bring an action in contract to recover the expenses plus interest" if the insurer fails to pay the expenses when due under PIP coverage. Utah Code Ann. § 31A-22-309(5).

The case of Neel v. State of Utah, 213 Utah Adv. Rep. 43 (Utah Ct. App. 5/21/93) is distinguishable from the present case because Neel was a passenger in the state vehicle at the time of the accident and therefore qualified as a person entitled to PIP benefits under § 31A-22-308. As such, she was entitled to sue the State, as a self-insurer, in contract, to recover PIP benefits. Unlike Neel, this Plaintiff does not qualify for PIP protection and therefore may not maintain a contract cause of action against the State or against these Defendants.

Plaintiff may claim that it is entitled to proceed under

§ 31A-22-309(6) which requires insurers to determine their respective liabilities through mandatory, binding arbitration. This section is not applicable in the present case since neither the Defendants nor the State are considered "insurers" under the code. *See* U.C.A. § 31A-12-107. The Utah Court of Appeals ruled in McCaffery on behalf of McCaffery v. Grow, 787 P.2d 901, 905 (Utah App. 1990) that Section 31A-22-309(6) does not contemplate arbitration between a self-insured and an insurance company. The Court also concluded that even if self-insureds were included in § 31A-22-309(6) that the courts would not be the correct forum to pursue a claim since the statute specifies arbitration as the proper recourse. Id. at 905, n. 4.

Based upon all of the foregoing, Defendants request that Plaintiff's Motion to Vacate Minute Entry be denied.

DATED this 13th day of July, 1993.

JAN GRAHAM
Attorney General

Barbara E. Ochoa

BARBARA E. OCHOA
Assistant Attorney General
Attorney for Defendants

CERTIFICATE OF MAILING

THIS IS TO CERTIFY that I mailed a true and correct copy of the foregoing **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO VACATE MINUTE ENTRY**, postage prepaid, this 13th day of July, 1993, to the following:

Thomas A. Duffin
JENSEN, DUFFIN, CARMAN, DIBB & JACKSON
Attorneys for Plaintiff
311 South State, Suite 380
Salt Lake City, Utah 84111

Debbie Briggs

THOMAS A. DUFFIN (927) of
JENSEN, DUFFIN, CARMAN, DIBB & JACKSON
Attorneys for Plaintiff
311 South State, Suite 380
Salt Lake City, Utah 84111
Telephone: (801) 531-6600

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BEAR RIVER MUTUAL INSURANCE COMPANY, Plaintiff, vs. MIKE JACOBSEN and UTAH VALLEY COMMUNITY COLLEGE, a body politic of the State of Utah, Defendants.	**REQUEST FOR HEARING** Civil No. 920905486PD Judge Tyrone E. Medley

Comes now the Plaintiff, pursuant to Rule 4-501(3)(b), Utah Court Rules, Code of Judicial Administration, and requests a hearing on its Motion to File Second Amended Complaint and Motion to Vacate Minute Entry of June 16, 1993, and subsequent Request for Summary Judgment Ruling Referring the Matter to Arbitration.

Dated this 30 day of July, 1993.

JENSEN, DUFFIN, CARMAN, DIBB & JACKSON

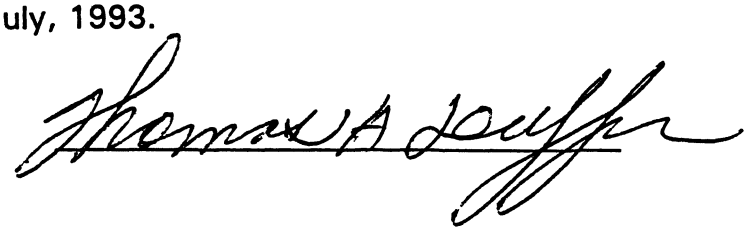
Thomas A. Duffin
Attorney for Plaintiff

MAILING CERTIFICATE

I certify that I mailed a copy of the foregoing Request for Hearing to the following parties by placing a true copy thereof in an envelope addressed to:

Barbara E. Ochoa
Assistant Attorney General
Attorney for Defendants
Litigation Division
330 South 300 East
Salt Lake City, Utah 84111

postage prepaid, this 16 day of July, 1993.



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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BEAR RIVER MUTUAL INSURANCE COMPANY, Plaintiff, vs. MIKE JACOBSEN and UTAH VALLEY COMMUNITY COLLEGE, a body politic of the State of Utah, Defendants.	)	**PLAINTIFF'S REPLY TO DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO VACATE MINUTE ENTRY AND REQUEST FOR SUMMARY JUDGMENT RULING REFERRING THE MATTER TO SUBROGATION** Civil No. 920905486PD Judge Tyrone E. Medley

Comes now the Plaintiff and submits its Reply to Defendant's Memorandum in Opposition to Plaintiff's Motion to Vacate Minute Entry and Request for Summary Judgment Ruling Referring the Matter to Subrogation.

Background

Since the Court made its initial minute entry in the above-entitled matter, and the Defendant has filed its reply memorandum, the Court of Appeals in the case of **Neel v. State of Utah**, 213 Utah Adv.Rep. 43, handed down a decision in reference to personal injury benefits as more fully set forth in Utah Code Annotated, 1953, as amended §31A-22-302. Therefore, the complete setting of the case has been

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changed and therefore, the above-entitled matter should be referred, if the State so desires, for arbitration, as more fully set forth in **McCaffery on behalf of McCaffery v. Grow**, 787 P.2d 901 (Utah App. 1990).

ARGUMENT

Point I.

THE MOTION SHOULD NOT BE DISMISSED ON THE BASIS OF NEGLIGENCE.

In the **Neel** case, supra, it states that all PIP benefits are based on contract. That matters based upon contract are not subject to the notice requirements of the Government Immunity Act. The Defendant complete ignores the decision and fails to realize that this action is not brought for and on behalf of Bear River Mutual's insured, but Bear River Mutual's right under PIP benefits, Utah Code Annotated, 1953, as amended §31A-22-309.

Point II.

THE ABOVE-ENTITLED COURT SHOULD APPOINT AN ARBITRATOR FOR A DECISION IN THE MATTER.

Utah Code Annotated, 1953, as amended § provides that self-insurers are on on the same basis as insurance companies. Utah Code Annotated, 1953, as amended §31A-22-309 states:

> "(6) Every policy providing personal injury protection coverage is subject to the following:
>
> (a) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under personal injury protection have been paid by another insurer, including the Workers' Compensation Fund of Utah, the insurer of the person who would

be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and

(b) that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers."

The **Neel** case, supra, is dispositive of the very issue in this case in which the Court stated as follows:

"Section 41-12a-401(1)(d) specifically requires that in order for the State to self-fund its motor vehicle insurance obligations, it must have a certificate of self-funded coverage. Section 41-12a-407(2) governs self-funding certificates and provides that anyone who holds

> a certificate of self-funded coverage under this chapter shall pay benefits to persons injured from the self-funded person's operation, maintenance, and use of motor vehicles *as would an insurer issuing a policy to the self-funded person containing the coverages under Section 31A-22-302.*

Utah Code Annotated, §41-12a-407(2) (Supp. 1992) (emphasis added). *See also* section 41-12a-306(3) (owners maintaining owner's security by means other than an insurance policy must comply with sections 31A-26-301 through -311, which govern the claim practice of 'insurers').

While the State is not a statutory 'insurer' for the general purposes of title 31A, section 41-12a-407(2) expressly requires the State to assume certain obligations of an 'insurer' if the State elects to self-insure. By electing to self-insure, the State has elected to provide PIP benefits in the same manner an an independent insurer. If the State, as a self-insured owner, must pay PIP benefits just as if it were an independent insurer of those benefits, then there is no rational distinction between a lawsuit brought against the State for failure to pay PIP benefits and a similar lawsuit brought against an independent insurer. In both cases, the injured party is suing the 'insurer' of the vehicle based upon a statutorily created contractual claim.

We therefore hold that a suit to recover PIP benefits brought directly agianst the State as the self-insurer of its motor vehicles is contractual in nature. The State's election to self-insure cannot become a stumbling block to the swift recovery of PIP benefits. Neel's benefit claim should therefore be resolved in the same speedy manner it would have been had the State purchased an independent insurance policy."

The defendant is this case is objecting pursuant to the case of **McCaffery on behalf of McCaffery v. Grow**, supra, which states that arbitration is the correct forum for reimbursement pursuant to PIP benefits. This may be so; but the State in this case should demand arbitration or file an appropriate objection by motion. The above-entitled Court, pursuant to a proper motion should then appoint an arbitrator to hear the matter and properly dispose of it.

Therefore, putting all semantics aside, we will agree, pursuant to the **McCaffery** case, supra, and Utah Code Annotated, 1953, as amended §31A-22-309(1), that the Court should appoint an arbitrator with the authority to arbitrate the PIP benefits between Plaintiff and Defendant.

Dated this 22 day of July, 1993.

JENSEN, DUFFIN, CARMAN, DIBB & JACKSON

Thomas A. Duffin
Attorney for Plaintiff

MAILING CERTIFICATE

I certify that I mailed a copy of the foregoing Response to the following parties by placing a true copy thereof in an envelope addressed to:

Barbara E. Ochoa
Assistant Attorney General
Attorney for Defendants
Litigation Division
330 South 300 East
Salt Lake City, Utah 84111

postage prepaid, this 27 day of July, 1993.

Polly Mansfield

t. evidence in the record and for further findings and conclusions in support of the alimony award.

Norman H. Jackson, Judge

WE CONCUR:

Russell W. Bench, Judge

Regnal W. Garff, Judge

---

1. In essence, Mr. Godfrey is claiming that he received an advancement from his father in anticipation of the share he would inherit from his father's estate. *See* Utah Code Ann. §75-2-110 (1993). Even if Mr. Godfrey had provided sufficient evidence that he had received an advancement on his inheritance from his father, he cannot also claim the advancement constituted a loan because the terms have mutually inconsistent definitions. *See Ned J. Bowman Co. v. White*, 369 P.2d 962, 964 (Utah 1962).

2. An exchange between Mrs. Godfrey's attorney and the court supports this conclusion:

> Mr. Hadfield: Does the court find that there has been proven a debt to the estate on the Harper property? There were no documents that were produced on that.
>
> The Court: I believe there would be a debt on it, yes. All debts that are in the form of mortgages and that type of thing will have to be assumed on the property she takes.

3. Mrs. Godfrey also contests Mr. Godfrey's assertion of a $14,000 debt against another piece of property awarded to her, allegedly owed to the family nursing home corporation. Mrs. Godfrey points out that this alleged obligation was unsupported by the evidence. Moreover, the trial court did not make a finding regarding this obligation. We agree that there is insufficient evidence in the record to support the existence of this claimed obligation.

4. Mr. Godfrey also argued the stock transfer was restricted and the stock could only be sold to his brother and sisters at par value, and thus, his two hundred shares had a value of only $200. However, the trial court doubted the enforceability of this requirement and gave little weight to it in valuing the stock.

5. We decline to use the record and to apply the three factors as a matter of law on appeal.

Cite as
213 Utah Adv. Rep. 43

IN THE UTAH COURT OF APPEALS

Sue NEEL,
Plaintiff and Appellant,
v.
STATE OF UTAH,
Defendant and Appellee.

No. 920547-CA
FILED: May 21, 1993

Second District, Weber County
The Honorable Stanton M. Taylor

ATTORNEYS:
Daniel L. Wilson, Ogden, for Appellant
Jan Graham and Brent A. Burnett, Salt Lake City, for Appellee

Before Judges Bench, Orme, and Russon.

This opinion is subject to revision before publication in the Pacific Reporter.

BENCH, Judge:

Appellant, Sue Neel, appeals the trial court's dismissal of her claim against the State of Utah for insurance benefits. We reverse and remand.

BACKGROUND

In December of 1990, Neel was a passenger in a State-owned vehicle when she was injured in an accident. Utah law requires the State to maintain security providing certain benefits to persons injured in automobile accidents involving state-owned vehicles. Neel filed a claim for benefits with the State Department of Risk Management. She filed directly with the State because the State was self-insured. When no benefits were timely paid, Neel filed suit in district court, seeking payment from the State as the "insurer" of the vehicle.

The State moved to dismiss Neel's complaint. It argued that since she was suing the State, she must comply with the procedural requirements of the Utah Governmental Immunity Act. Utah Code Ann. §63-30-1 through -38 (1989). Specifically, the State argued that Neel failed to comply with section 63-30-12 which provides that a party with a claim against the State must file a notice of claim with the attorney general and the agency involved before filing a lawsuit. Additionally, the State claimed that she failed to comply with section 63-30-19 which requires that any lawsuit filed against the State be accompanied by an undertaking to cover taxable costs in the event the State prevails.

Neel responded that she was not required to comply with the notice and undertaking ents because she was bringing an action

in contract, and contract suits are expressly exempted from the procedural requirements by section 63-30-5(1). The trial court nevertheless granted the State's motion and dismissed Neel's complaint without prejudice.

Neel asserts on appeal that the trial court misconstrued her contract claim to be a tort claim. She contends that since the State is self-insured, she must bring her contract claim for benefits against the State directly, just as if she were bringing it against a separate insurer of the State. Consequently, she argues that the notice of claim and the undertaking requirement do not apply to her lawsuit. We agree.

STANDARD OF REVIEW

When we review a trial court's decision to dismiss a cause of action, we assume that the factual allegations made by the plaintiff are true. We then review the trial court's ruling to see whether the prevailing party was nevertheless entitled to dismissal as a matter of law. We therefore apply a correction-of-error standard of review to the trial court's ruling. *Anderson v. Dean*, 841 P.2d 742, 744 (Utah App. 1992).

ANALYSIS

Neel's assertion that her claim against the State may be heard without complying with the procedural requirements of the Governmental Immunity Act stems from the State's statutory obligation to insure its motor vehicles.

> The state of Utah and all its political subdivisions and their respective departments, institutions, or agencies shall maintain owner's or operator's security in effect continuously with respect to their motor vehicles.

Utah Code Ann. §41-12a-301(3) (1988).

In order to maintain "owner's or operator's security," the State must exercise one of the following methods of securing benefits for a party injured in an automobile accident involving a State vehicle: (1) an insurance policy; (2) a surety bond; (3) a deposit with the state treasurer; (4) a certificate of self-funded coverage; or (5) a policy issued by the Risk Management Fund. Section 41-12a-103(9).[1] Each of these methods must provide the following "personal injury protection" coverages and benefits ("PIP benefits"): (1) reasonable medical expenses; (2) lost income resulting from an inability to work; (3) work the injured person would have performed for his or her family; (4) funeral benefits; and (5) wrongful death benefits. *See* section 31A-22-307. These PIP benefits must be provided for any "natural person whose injuries arise out of an automobile accident occurring while the person occupies a [covered] motor vehicle . . . ." Section 31A-22-308(3). Finally, section 31A-22-309(5) provides that a claimant entitled to PIP benefits may sue the insurer of a vehicle if the insurer fails to pay the PIP benefits within thirty days.

Neel brought her action against the State in accordance with the foregoing statutes. The State moved to dismiss Neel's cause of action for her failure to comply with the governmental Immunity Act. Neel admits that she has not provided the notice of claim and the undertaking required by the Act. She claims, however, that she is exempted from these requirements because her claim against the State is contractual in nature. Section 63-30-5(1) of the Act provides that:

> Immunity from suit of all governmental entities is waived as to any contractual obligation. Actions arising out of contractual rights or obligations shall not be subject to the requirements of Sections 63-30-11, *63-30-12*, 63-30-13, 63-30-14, 63-30-15, or *63-30-19*.

(Emphases added.)

In response, the State faults Neel for not identifying a contract between her and the State that has been breached. It is unnecessary, however, for Neel to identify a direct contract between the parties since Neel is an intended third-party beneficiary. Neel correctly asserts that section 31A-22-309(5) expressly states that an action brought to recover PIP benefits from the insurer of a vehicle is contractual. Section 31A-22-309(5) provides: "If the insurer fails to pay the expenses when due, . . . [t]he person entitled to the benefits may bring an action *in contract* to recover the expenses . . . ." (Emphasis added.) The narrow issue involved in this case is whether the State's assumption of the role of self-insurer has altered the contractual nature of an action brought against the State, as the insurer, to recover PIP benefits.

The State claims that the reference to "insurer" in section 31A-22-309(5) cannot include the State and points to the statutory definition of "insurer" found in section 31A-1-301(48)(a), which provides:

> "Insurer" means any person doing an insurance business as a principal, . . . and any person purporting or intending to do an insurance business as a principal on his own account. *It does not include a governmental entity, as defined in Subsection 63-30-2(3), to the extent it is engaged in the activities described in Section 31A-12-107.*

(Emphasis added.) The State further cites to section 31A-12-107, which provides:

> Notwithstanding any other provision of this title, a governmental entity, as defined in Subsection 63-30-2(3), *is not an insurer for purposes of this title and is not engaged in the business of insurance to the extent it is covering its own liabilities under Title 63, Chapter 30, the Governmental Immunity Act,* or engaging in other related risk management activities related to the normal course of its activities.

(Emphasis added.) Finally, the State argues that the provisions of title 31A do not pertain to self-insurers. Section 31A-1-103(3), states: "Except as otherwise expressly provided, this title does not apply to: . . . (f) self-insurance; . . . ."

These provisions indeed declare that the State is not a statutory "insurer" as that term is generally used in title 31A. However, this exclusion of the State from the general provisions of title 31A is superseded by specific statutory language which expressly requires that the State comply with certain portions of title 31A. *See Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 216 (Utah 1984) ("When two statutory provisions appear to conflict, the more specific provision will govern over the general provision."). Likewise, the exclusion of self-insurance from the effects of title 31A is overcome by other specific statutes expressly providing that sections 31A-22-302 through -309 apply to self-insurers.

Section 41-12a-401(1)(d) specifically requires that in order for the State to self-fund its motor vehicle insurance obligations, it must have a certificate of self-funded coverage. Section 41-12a-407(2) governs self-funding certificates and provides that anyone who holds

> a certificate of self-funded coverage under this chapter shall pay benefits to persons injured from the self-funded person's operation, maintenance, and use of motor vehicles *as would an insurer issuing a policy to the self-funded person containing the coverages under Section 31A-22-302.*

Utah Code Ann. §41-12a-407(2) (Supp. 1992) (emphasis added). *See also* section 41-12a-306(3) (owners maintaining owner's security by means other than an insurance policy must comply with sections 31A-26-301 through -311, which govern the claim practice of "insurers").

While the State is not a statutory "insurer" for the general purposes of title 31A, section 41-12a-407(2) expressly requires the State to assume certain obligations of an "insurer" if the State elects to self-insure. By electing to self-insure, the State has elected to provide PIP benefits in the same manner as an independent insurer. If the State, as a self-insured owner, must pay PIP benefits just as if it were an independent insurer of those benefits, then there is no rational distinction between a lawsuit brought against the State for failure to pay PIP benefits and a similar lawsuit brought against an independent insurer. In both cases, the injured party is suing the "insurer" of the vehicle based upon a statutorily created contractual claim.

We therefore hold that a suit to recover PIP benefits brought directly against the State as the self-insurer of its motor vehicles is contractual in nature.[2] The State's election to self-insure cannot become a stumbling block to the swift recovery of PIP benefits. Neel's benefit claim should therefore be resolved in the same speedy manner it would have been had the State purchased an independent insurance policy.

CONCLUSION

Neel is suing the "insurer" of the State's vehicle as is her "contractual" right terms of section 31A-22-309(5). When opted to self-insure for the PIP benefits required in section 31A-22-302, it assumed the statutory role of "insurer" for purposes of section 31A-22-309(5). A lawsuit brought by an injured party against the State as the "insurer" of its vehicles therefore remains contractual in nature. Since Neel's cause of action was contractual in nature, she was exempt from the notice of claim and undertaking requirements found in the Governmental Immunity Act. The trial court therefore erred in dismissing her complaint.

The dismissal of Neel's complaint is reversed and this matter is remanded to the trial court for further proceedings.[3]

Russell W. Bench, Judge

I CONCUR:

Leonard H. Russon, Judge

I CONCUR IN RESULT:

Gregory K. Orme, Judge

---

1. Regardless of the form of security selected, the owner must provide the intended beneficiaries the full benefits required by statute.

> "Owner's or operator's security," "owner's security," or "operator's security" mean any of the following:
>
> (a) an insurance policy or combination of policies *conforming to Section 31A-22-302* which is issued by an insurer authorized to do business in Utah;
>
> (b) a surety bond issued by an insurer authorized to do a surety business in Utah in which the surety is subject to the minimum coverage limits and other requirements of policies *conforming to Section 31A-22-302*, which names the department as a creditor under the bond for the use of persons entitled to the proceeds of the bond;
>
> (c) a deposit with the state treasurer of cash or securities *complying with Section 41-12a-406*;
>
> (d) maintaining a certificate of self-funded coverage *under Section 41-12a-407*;
>
> (e) a policy *conforming to Section 31A-22-302* issued by the Risk Management Fund created in Section 63-1-47.

Section 41-12a-103(9)(Supp. 1992) (emphases added); *see also* sections 41-12a-406(2) and -407(1) (expressly referring to section 31A-22-302); and section 31A-22-302 (requiring benefits found in section 31A-22-307).

2. Otherwise, individuals injured in State vehicles could be treated differently depending upon whether the State opted to self-insure or to purchase an independent insurance policy. If the State were to purchase an independent insurance policy, a claimant could simply file for PIP benefits without impediment. If benefits were not timely paid, the claimant could file a third-party beneficiary contract suit directly against the insurer, without the cost of an undertaking. The claimant could also file multiple benefit claims on a monthly basis as soon as expenses accrued and the insurer would be required to pay those benefits within thirty days or face an immediate lawsuit.

If, on the other hand, a claimant were required to satisfy the Governmental Immunity Act before claiming PIP benefits, the claimant would incur additional costs and be required to jump through additional procedural hoops. The claimant would be either to file a separate notice of claim each

accumulate all claims and wait to file a single notice of claim long after accident. In either case, the claimant may have to wait for up to ninety days, instead of thirty days, for a response from the "insurer." It is unlikely that the legislature anticipated or intended that claimants endure such delays when it allowed the State to self-insure for PIP benefits. This increased burden would clearly be inconsistent with the legislative intent found in section 31A-22-309(5) that all persons receive their PIP benefits from the insurer of the vehicle immediately and with a minimum amount of difficulty. *See also* section 31A-26-302(1) ("All claims shall be settled as soon as possible . . . .").

3. The State asserts for the first time on appeal that Neel, a State employee, is barred from seeking PIP benefits from the State by the exclusive remedy provision of the Workers' Compensation Act. *See IML Freight, Inc. v. Ottosen*, 538 P.2d 296 (Utah 1975) (employees may not recover additional benefits from an employer's no-fault insurance policy). Given the fact that only the procedural prerequisites have been placed in issue in this appeal, we do not address whether the State is otherwise immune from Neel's suit. Since that issue has yet to be addressed, it may properly be considered on remand.

gations to act in good faith and in a commercially reasonable manner. Heller failed to provide a trial transcript in the record on appeal. Absent a transcript, we must presume the trial court's findings are based on admissible, competent, substantial evidence. *Burke v. Burke*, 733 P.2d 498 (Utah 1986). However, the challenged findings pertain only to the loan agreement between Rock Wool and Heller. Heller's obligations thereunder are not conditions to the Ekinses' liability under their unconditional guaranty. We conclude that findings as to bad faith under the loan agreement are not pertinent to the question of liability on the personal guaranty.

The judgment in favor of the Ekinses is reversed, and the award of attorney fees is vacated. The case is remanded with instructions to the trial court to enter judgment for Heller in the amount of Rock Wool's indebtedness plus interest, costs, and attorney fees.

BILLINGS and ORME, JJ., concur.

Michael H. McCAFFERY, as personal representative for and on behalf of Christopher M. McCAFFERY, deceased, Plaintiff and Appellant,

v.

Terry Raymond GROW, as personal representative of Rodney V. Grow, deceased, Terry Raymond Grow and Pat Grow, individually, and State Farm Mutual Automobile Insurance Company, Defendants and Respondents.

No. 880566-CA.

Court of Appeals of Utah.

Feb. 16, 1990.

Deceased passenger's father sued insurer of driver, who operated motor vehicle without owner's consent, for personal injury protection benefits. The Third District Court, Salt Lake County, James S. Sawaya, J., granted summary judgment in favor of insurer, and father appealed. The Court of Appeals, Orme, J., held that: (1) father was not entitled to personal injury protection benefits and coverage under either insurance code or particular policy with insurer; (2) father was not entitled to proceed against insurer under parental liability statute; and (3) father could not seek subrogation from insurer.

Affirmed.

1. Insurance ⇐467.61(2)

Father of deceased passenger was not entitled to personal injury protection coverage under the driver's policy where passenger was not a relative of the driver's family who resided with them nor was he killed while riding in a vehicle which was insured by driver's insurer. U.C.A.1953, 31A-22-308.

2. Insurance ⇐467.61(2)

Language of driver's policy, which provided personal injury protection benefits to named insured and related persons who resided with insured and other persons injured in insured vehicle, was not ambiguous and did not include passenger within scope of coverage where passenger was not a relative of the driver's family who resided with them nor was he killed while riding in the driver's vehicle which was insured by his insurer.

3. Compromise and Settlement ⇐16(1)

Deceased passenger's father, who settled his claims against minor driver's mother under statute imputing liability to person who signed application of minor for driver's permit or license, could not reassert the claims in the guise of a further claim against mother's insurer for personal injury protection benefits. U.C.A.1953, 41-2-115(2).

4. Insurance ⇐2, 604(1)

Father of deceased automobile passenger was not an "insurer," notwithstanding that one may legally provide security in lieu

absolute guarantor may consent to the impairment of collateral, and such waiver may be given in advance in the guaranty agreement provided it is explicit and unequivocal). *See also Continental Bank & Trust Co. v. Utah Sec. Mortgage, Inc.*, 701 P.2d 1095 (Utah 1985).

of automobile insurance, and thus, statute, requiring personal injury protection (PIP) insurer of person liable for injuries to reimburse another insurer who had paid PIP benefits, did not require PIP insurer of negligent driver to reimburse father for sums he expended due to the passenger's death. U.C.A.1953, 31A-22-309(6).

See publication Words and Phrases for other judicial constructions and definitions.

James R. Brown and Harold L. Reiser, Salt Lake City, for plaintiff and appellant.

Darwin C. Hansen and John C. Hansen, Bountiful, for defendants and respondents.

Before GARFF, GREENWOOD and ORME, JJ.

ORME, Judge:

Appellant Michael H. McCaffery appeals from a summary judgment order dismissing his claim against respondent insurance company for personal injury protection benefits. We affirm.

FACTS

The facts are essentially undisputed in this case. On August 27, 1986, a group of high school students attended a "last summer fling" drinking party in East Canyon. Sometime during the party, Christopher McCaffery, Rodney Grow, and Michael Quintana went joyriding up and down East Canyon in an automobile owned by Michael Morris, without his knowledge or permission. While Rodney Grow was driving the vehicle, he lost control and crashed into a tree. The three young men were killed.

The automobile was not insured. Moreover, it appears that neither Christopher McCaffery, nor his parents with whom he resided, had automobile insurance. Rodney Grow and his mother, who had signed Rodney's driver's license application, were insureds of respondent State Farm Mutual Automobile Insurance Company ("State Farm") at the time of the accident.

Michael McCaffery ("McCaffery") brought suit against several defendants on behalf of his late son Christopher's estate. He claimed that Rodney Grow was liable, and so sued his father and personal representative, Terry Grow. He claimed Pat Grow, Rodney's mother, was jointly and severally liable because she signed Rodney's driver's license application and Rodney Grow was still a minor at the time of his death. He claimed that State Farm was responsible as the insurer of Rodney Grow.

McCaffery settled all claims against all defendants except for his claim for personal injury protection ("PIP") benefits against State Farm. State Farm moved for summary judgment on this claim. It argued that neither its insurance policy nor the law requires the payment of PIP benefits to a passenger injured in an automobile which is not covered by the policy, even though driven by an insured, where the insured does not have the permission of the owner. The district court agreed and granted State Farm summary judgment.

On appeal, McCaffery raises several arguments. Although he did not himself see fit to secure the insurance required by the same law, he claims that the State Farm policy impermissibly denies PIP benefits in contravention of Utah's insurance code and public policy. He asserts that the language in the insurance policy is ambiguous and should be construed against State Farm to allow recovery of PIP benefits. He argues that State Farm should pay the PIP benefits because it also insured Pat Grow, who was liable as the signor of Rodney's motor vehicle license application. Finally, McCaffery argues that he is entitled to subrogation from State Farm for the expenses he incurred as a result of Grow's negligence.

DENIAL OF PIP BENEFITS

[1] The motor vehicle insurance sections of Utah's insurance code require every insurer to include liability coverage, uninsured motorist coverage, and PIP coverage in their motor vehicle insurance policies. *See* Utah Code Ann. § 31A-22-302 (1989). The code extends PIP coverage to individuals described in Utah Code Ann. § 31A-22-308 (1986) and prevents the insurer from excluding PIP benefits to those

persons except in seven narrowly defined situations. *See* Utah Code Ann. § 31A-22-309 (1989).[1]

McCaffery focuses his argument on the exclusionary provision set forth in section 309, relying on *State Farm Mut. Auto. Ins. Co. v. Mastbaum*, 748 P.2d 1042 (Utah 1987), and *Farmers Ins. Exch. v. Call*, 712 P.2d 231 (Utah 1985). These cases held that an insurance company could not create an exclusion which would prevent a resident family member of the insured from recovering PIP benefits under the insured's policy.

In response to McCaffery's position, State Farm argues the issue is not one of *exclusion* from coverage. Rather, State Farm argues that, unlike the plaintiffs in *Mastbaum* and *Call*, Christopher McCaffery was never *included* in the class of insureds. *See Osuala v. Aetna Life & Cas.*, 608 P.2d 242, 243 (Utah 1980). *See also Protective Nat'l Ins. Co. v. Padron*, 310 So.2d 432, 433 (Fla.Dist.Ct.App.1975). We agree.

The insurance code provides that "[e]very policy of insurance or combination of policies, purchased to satisfy the owner's or operator's security requirement ... shall also include personal injury protection under sections 31A-22-306 through 31A-22-309." Utah Code Ann. § 31A-22-302(2) (1989). Section 306 then states that "[p]ersonal injury protection under Subsection 31A-22-302(2) provides coverages and benefits ... *to persons described under § 31A-22-308*, but is subject to the limitations, exclusions, and conditions set forth in § 31A-22-309." Utah Code Ann. § 31A-22-306 (1986) (emphasis added). Thus, we must first look to section 308 to determine who is within the scope of the PIP coverage and benefits provided for by law.

Section 308 provides:

> The following may receive benefits under personal injury protection coverage:
>
> (1) *the named insured and persons related to the insured* by blood, marriage, adoption, or guardianship *who are residents of the insured's household*, including those who usually make their home in the same household but temporarily live elsewhere, when injured in an accident in Utah involving any motor vehicle; and
>
> (2) *any other natural person* whose injuries arise out of an automobile accident occurring in Utah while the person occupies a *motor vehicle described in the policy* with the express or implied consent of the named insured or while a pedestrian if he is injured in an accident involving the *described motor vehicle.*

Utah Code Ann. § 31A-22-308 (1986) (emphasis added). As concerns the subject State Farm policy, McCaffery does not, nor could he, claim that Christopher falls within the ambit of section 308. Christopher was not a relative of the Grows who resided with them nor was he killed while riding in the Grow vehicle insured by State Farm. Thus, the law did not require State Farm to extend PIP benefits to someone in Christopher's position.[2]

1. When this controversy arose the code only contained four narrowly defined situations in which the insurer could exclude PIP benefits. The code provided:

> Any insurer issuing personal injury protection coverage under this part may only exclude from this coverage benefits:
>
> (i) for any injury sustained by the insured while occupying another motor vehicle owned by the insured and not insured under the policy;
>
> (ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle; or
>
> (iii) to any injured person, if the person's conduct contributed to his injury:
>
> (A) by intentionally causing injury to himself; or
>
> (B) while committing a felony.

Utah Code Ann. § 31A-22-309(2)(a) (1986).

2. McCaffery argues that public policy requires the extension of PIP benefits and coverage to all innocent victims of automobile accidents. It is true that the No-Fault Act was adopted in order to protect the rights of innocent accident victims. *Farmers Ins. Exch. v. Call*, 712 P.2d 231, 235 (Utah 1985). However, "[a]n important aspect of the Act is the requirement that the PIP protections for an injured motorist are to be paid by his own insurer." *Osuala v. Aetna Life & Cas.*, 608 P.2d 242, 243 (Utah 1980). It is

Nor does State Farm's policy purport to extend PIP benefits to Christopher. The policy stated, in the No–Fault section, that State Farm would "pay in accordance with the *No–Fault Act* for *bodily injury* to *insured* caused by accident resulting from the maintenance or use of a *motor vehicle* as a *motor vehicle.*" On the page immediately following this language, the policy defined insured to mean, with our emphasis,

1. *you, your spouse* or any *relative*:

   ....

   ... and

2. any other *person*:

   a. while *occupying your car* or a *newly acquired car* with the permission of:

      (1) *you, your spouse,* any *relative;* or

      (2) the *person,* driving such *car* with *your* permission; or

   b. when struck as a *pedestrian* by *your car* or a *newly acquired car.*

The language in these provisions is no more expansive than that in section 308. Thus, neither the law nor the particular policy in question purport to extend PIP benefits to persons in Christopher McCaffery's position. We hold that McCaffery is not entitled to PIP coverage under the State Farm policy covering Rodney Grow.

AMBIGUITY OF POLICY

[2] McCaffery asserts that the language of the insurance policy is ambiguous and should be construed to allow McCaffery to recover PIP benefits. This argument is without merit.

To illustrate his argument, McCaffery cites *State Farm Mut. Auto. Ins. Co. v. Eastman,* 158 Cal.App.3d 562, 204 Cal. Rptr. 827 (1984). In *Eastman,* the California court determined that language in the liability portion of a policy was ambiguous and could reasonably be read to extend coverage to appellant. The court concluded that, when ambiguous, language should be read "in its most inclusive sense, for the benefit of the insured." 204 Cal.Rptr. at 830 (quoting *Continental Cas. Co. v. Phoenix Constr. Co.,* 46 Cal.2d 423, 296 P.2d 801, 810 (1956)).

Utah courts embrace the rule of law stated in *Eastman. See, e.g., LDS Hosp. v. Capitol Life Ins. Co.,* 765 P.2d 857, 861 (Utah 1988) ("any ambiguity must be resolved in favor of the insured and in favor of coverage"). However, McCaffery has not shown any ambiguity within the PIP section of the policy. Rather, McCaffery refers us to language in the liability portion of the policy which was similar to language in the policy in *Eastman.* He then implies that because language might have been ambiguous in the liability section of the policy we should find the entire policy to be ambiguous and allow recovery under the PIP section. This does not follow. McCaffery has settled any claims he had under the liability section of the policy. The only issue properly before us in this appeal is the entitlement to PIP benefits under the PIP section of the policy. McCaffery has not demonstrated any relevant ambiguity in that portion of the policy. On the contrary, the policy—clearly and unambiguously—does not include Christopher McCaffery within the scope of coverage for PIP benefits.

PAT GROW'S LIABILITY AS SIGNOR OF RODNEY GROW'S LICENSE APPLICATION

[3] McCaffery argues that Pat Grow is jointly and severally liable for the damage caused by her minor child, Rodney, under Utah Code Ann. § 41–2–115(2) (1988), which provides:

> Any negligence or willful misconduct of a minor younger than 18 years of age when operating a motor vehicle upon a highway is imputed to the person who has signed the application of the minor for a permit or license. This person is jointly and severally liable with the minor for any damages caused by the negligence or willful misconduct....

He further argues that State Farm, as Pat Grow's insurer, is ultimately liable for

pertinent to note that the Legislature contemplated protection for Christopher McCaffery in the instant situation through the insurance policy the McCafferys should have acquired on their own automobile. *See id.*

these costs and should pay the PIP benefits.

In response to this assertion, State Farm raises several arguments. However, we need only address one argument which is dispositive of the issue. In order to reach State Farm on this theory, McCaffery must first prove the liability of Pat Grow under § 41-2-115(2). Prior to summary judgment, the various parties to the action reached a stipulation to dismiss McCaffery's complaint against all of the defendants except State Farm and to dismiss all claims against State Farm except for the claim concerning PIP benefits. Thereafter, the court dismissed the various claims with prejudice. McCaffery has settled his claims against Pat Grow and cannot now resurrect them in the guise of a further claim against State Farm—especially where the only claim expressly reserved as against State Farm is that concerning PIP benefits.

STATE FARM'S DUTY TO INDEMNIFY MICHAEL McCAFFERY

[4] Finally, McCaffery apparently argues that State Farm is ultimately liable at least for certain sums he actually expended by reason of Christopher's death. He relies on section 309(6) of the insurance code, which at the time of the accident was phrased as follows:

> Every policy providing personal injury protection coverage shall provide:
>
> (a) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under personal injury protection have been *paid* by *another insurer*, including the Workers' Compensation Fund of Utah, the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and
>
> (b) that the issue of liability for that reimbursement and its amounts shall be decided by mandatory, binding *arbitration between the insurers.*

Utah Code Ann. § 31A-22-309(6) (1986) (emphasis added). McCaffery cannot prevail under this statutory provision.

In order to invoke the provisions of section 309(6), the individual who initially pays the amounts for which PIP benefits are also available must be "another insurer." Although McCaffery correctly observed at oral argument that the law allows a person to provide his or her own security in place of automobile insurance,[3] to do so does not make one "an insurer" within the meaning of the statute. According to Utah Code Ann. § 31A-1-301(48)(a) (1989), " '[i]nsurer' means any person doing an insurance business as a principal." McCaffery does not claim, and the facts do not suggest, that he was a "principal" "doing an insurance business" when he paid Christopher's medical bills and the like. Section 31A-22-309(6) simply does not contemplate arbitration between an uninsured victim's father and another's insurance company.[4]

CONCLUSION

McCaffery is not entitled to PIP benefits and coverage under either the Utah insurance code or the particular policy with State Farm. Moreover, he is not entitled to proceed against State Farm under § 41-2-115(2) because he stipulated to the release of any claim he might have had against Pat Grow. Finally, he may not seek subrogation from State Farm under § 31A-22-309(6) because he is not "an insurer" within the meaning of the statute. In all respects, we affirm.

GARFF and GREENWOOD, JJ., concur.

3. *See* Utah Code Ann. § 41-12a-301 to -412 (1988). However, McCaffery does not contend he actually complied with these provisions.

4. We note that even if we were to find that § 31A-22-309(6) was available to McCaffery, this court would not be the correct forum in which to pursue his claim. The statute specifies arbitration as the proper recourse.

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
BEAR RIVER MUTUAL	:	
PLAINTIFF	:	CASE NUMBER 920905486 PD
	:	DATE 09/15/93
VS	:	HONORABLE TYRONE E. MEDLEY
	:	COURT REPORTER
JACOBSEN, MIKE	:	COURT CLERK AJG
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY. DUFFIN, THOMAS A.
D. ATTY. OCHOA, BARBARA H

PLAINTIFFS MOTION TO VACE MINUE ENTRY DATED JUNE 16,1993, MOTION TO FILE AMENDED COMPLAINT, AND MOTION FOR ADDITIONAL ORAL ARGUMENT ARE SUMMARILY DENIED FOR THE FOLLOWING REASONS;

1) THE JUNE 16, 1993 MINUTE ENTRY ENCOMPASED THE ISSUES RAISED IN THE FOREGOING MOTIONS.
2) THE COURT REVIEWED NEIL VS STATE OF UTAH PRIOR TO PREPARATION OF JUNE 16, 1993 MINUTE ENTRY AND FOUND NEIL TO BE DISTINGUISHABLE FFROM THE PRESENT CASE.
3) THE COURT SUBMITS SECOND REQUEST TO THE STATE OF UTAH TO PREPARE AN ORDER CONSISTENT WITH THIS MINUTE ENTRY AND THE JUNE 16, 1993 MINUTE ENTRY

CC: THOMAS A DUFFIN
BARBARA H. OCHOA

Tyrone E Medley
Anita Stonefarm

00130

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

BEAR RIVER MUTUAL INSURANCE COMPANY Plaintiff, vs. MIKE JACOBSEN and UTAH VALLEY COMMUNITY COLLEGE, a body politic of the State of Utah, Defendants.	:	**ORDER OF DISMISSAL** Civil No. 920905486PD Judge Tyrone E. Medley

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This matter came before the Court on April 19, 1993 on Defendant's Motion to Dismiss, the Honorable Tyrone E. Medley presiding. Plaintiff was represented by counsel, Thomas A. Duffin, and Defendant was represented by counsel, Barbara E. Ochoa, Assistant Attorney General. In addition, the Court has considered the following motions which were subsequently submitted by Plaintiff: Motion to Vacate Minute Entry Dated June 16, 1993; Motion to File Amended Complaint; and Motion for Additional Oral Argument.

The Court having reviewed the pleadings on file, having heard the argument of counsel, and being fully advised in the premises,

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now orders as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Defendants' Motion to Dismiss Plaintiff's first cause of action is granted for the reason that Plaintiff failed to comply with the strict notice requirements of the Utah Governmental Immunity Act.

2. Defendants' Motion to Dismiss Plaintiff's second cause of action is granted for the reason that Plaintiff's complaint fails to state a claim upon which relief may be granted under U.C.A. § 31A-22-309(5).

3. Plaintiff's Motions to Vacate Minute Entry Dated June 16, 1993, to File an Amended Complaint and for Additional Oral Argument are denied for the reasons that the June 16, 1993 minute entry encompassed the issues raised in Plaintiff's subsequent motions and the Court had reviewed Neel v. State of Utah prior to issuing the Minute Entry of June 16, 1993, and found it to be distinguishable from the present case.

DATED this 13 day of Oct, 1993.

BY THE COURT:

Tyrone E. Medley

HON. TYRONE E. MEDLEY
Third District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

Approved as to form:

THOMAS A. DUFFIN